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No. 15-1251

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent acknowledges that the decision below reshapes the President's authority to fill the highest level posts in the Executive Branch on an acting basis, by repudiating the understanding of the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, on which every President since the statute's enactment has relied. And respondent does not dispute that the decision casts a cloud over the service of current and former officers in the highly consequential category of presidentially appointed, Senate-confirmed (PAS) offices, and calls into question the previously settled legal understanding shortly before a change in administrations that will necessitate many transitional and permanent appointments. Nor does respondent dispute that this case is an appropriate vehicle for reviewing the construction of the FVRA adopted below. Instead, respondent suggests that further review is unwarranted on the grounds that

it would be premature, that the decision below is unimportant, and that, in any event, the decision below is correct. Each of these arguments lacks merit. The petition for a writ of certiorari should be granted.

A. This Court's Review Is Warranted Now

Respondent argues that the court of appeals' interpretation of the FVRA, which alters the contours of the President's authority to designate acting officers, does not merit this Court's review because review would be "premature," Br. in Opp. 16, and because the decision below is not sufficiently important to warrant this Court's attention, *id.* 27-28. These arguments lack merit.

1. Respondent's contention that review would be premature is premised on its claim that "[i]f the question presented is as important as the Government argues * * * it will recur, and the Court will have another opportunity to grant certiorari if a circuit split develops." Br. in Opp. 15. The petition explained that this is not so—in an analysis that respondent does not address. Specifically, the petition explains, further developments concerning the question presented in the courts of appeals are unlikely because "the D.C. Circuit[has] exceptionally broad jurisdiction over administrative actions." Pet. 30. Consequently, future litigants seeking to bring a similar FVRA claim would have every reason to simply bring suit in the District of Columbia, where the decision below would control resolution of the question presented. See Pet. 29-30. Review in this case is not "premature" due to the absence of a circuit conflict, because future opportunities for a circuit conflict are unlikely to arise.

Respondent's proposal that this Court await the possibility of further litigation in other courts is particularly inappropriate because confusion and uncertainty appear likely to persist until the Court finally settles the meaning of the FVRA provision at issue here. As the petition describes, in the short time since its issuance, several examples of that confusion and uncertainty have arisen concerning the service of key officials and nominees. See Pet. 28-29 (discussing examples concerning nominee for Secretary of the Army; Under Secretary of Defense for Personnel and Readiness; Deputy Administrator of the Environmental Protection Agency; and Director of the Office of Personnel Management). The need to promptly resolve this uncertainty surrounding service at the highest levels is an additional consideration supporting this Court's review in this case.

Indeed, respondent's discussion of the uncertainty that the decision below has engendered is in substantial tension with its proposal that this Court await further litigation before finally resolving the meaning of the FVRA. Respondent does not dispute that the decision below has caused confusion and disruption, but brushes these problems aside on the ground that the President should eliminate the uncertainty that has been created surrounding high-level service—17 years after the FVRA was enacted—by reversing its longstanding interpretation, even before this Court has finally settled the FVRA's meaning. See Br. in Opp. 27-28 ("The new Administration simply needs to follow [the statute's] mandates."). That course, however, would definitively eliminate the potential for the further cases that respondent urges this Court to await. Respondent's contradictory arguments under-

score that the Court should settle the FVRA's meaning in this case—rather than awaiting further development that is unlikely to occur, at the cost of practical uncertainty that can impede government operations.

2. In the alternative, respondent asserts (Br. in Opp. 27-28) that although the decision below rejects the President's longstanding implementation of a statute affecting his appointment power—and casts doubt on high-level service under three Presidents—certiorari should be denied because the decision below is "not sufficiently important to warrant this Court's review." *Id.* at 27 (capitalization altered). Respondent's arguments on this point likewise lack merit.

Respondent first suggests (Br. in Opp. 27) that review of the question presented is unwarranted because too few officials are affected. Respondent relies on the petition's citation of 14 examples of past officials whose service would have been unlawful under the interpretation of the FVRA adopted below, in the course of describing how every President since the FVRA was enacted has filled high-level posts on an acting basis in accordance with the Office of Legal Counsel's interpretation of the statute. See Pet. 5-6. To the extent respondent is suggesting that the interpretation adopted by the decision below is relevant only to the service of 14 officials, however, respondent is mistaken. The government's preliminary review has identified scores of other officers who were nominated to occupy on a permanent basis PAS posts that they simultaneously held in an acting capacity, beyond the 14 illustrative examples in the petition. And because the affected posts are exclusively PAS positions, the officials whose service is called into question are

officials at the highest levels in the Executive Branch. Moreover, the decision below will also substantially constrain the authority of all future Presidents. Respondent errs in asserting that a decision that calls into question the actions of scores of high-level past officials and constrains future Presidents' authority over PAS posts is a decision too insignificant for this Court's review.

Respondent alternatively suggests (Br. in Opp. 28) that the decision below is not sufficiently important because it does not impose a significant constraint on presidential authority. But the President's role under the Constitution depends on the ability to effectively manage the Executive Branch. When the President has identified a senior official as the person most qualified to fill a high-level post, forcing the President to choose between nomination and acting service substantially limits the President's capacity to oversee the Executive Branch. See Pet. 26-27. Indeed, even respondent acknowledges this substantial impact once it turns to the merits of the FVRA question here. In that portion of its brief, respondent boldly asserts that the purpose of the FVRA is to prevent the President from "advancing his agenda" through acting officials, and that respondent's interpretation should be favored because it construes the FVRA provision here to stymie the President's ability to pursue his objectives during a vacancy. Br. in Opp. 19; see *id.* at 20, 25, 27. An interpretation of a federal statute that curbs presidential authority in this way is far from insignificant. This Court's review is warranted to

settle the scope of the FVRA's limits on presidential authority.[1]

B. The Court of Appeals' Decision Is Wrong

Respondent also argues (Br. in Opp. 16-27) that the court of appeals correctly construed the FVRA's limits, but its arguments are unavailing.

1. As the petition explains (Pet. 12-15), Section 3345(b)(1) is most naturally read as limiting only one of the three mechanisms for filling positions on an acting basis set out in the FVRA—the method for first-assistant service in Subsection (a)(1). That is because after Section 3345(a) sets out three separate mechanisms for acting service, Section 3345(b)(1) sets out a limitation that it describes as overriding only one of these three mechanisms. In particular, Subsection (b)(1) sets out a first-assistant-centric limitation on acting service that it specifies applies only "[n]otwithstanding subsection (a)(1)"—the first-assistant designation mechanism—rather than "not-

[1] Respondent also briefly suggests (Br. in Opp. 28) that the government "inflates the impact of the decision below" in emphasizing that the decision's impact "is heightened because of the stringent consequences that the FVRA imposes" for violations pursuant to 5 U.S.C. 3348(d), Pet. 27. Respondent suggests that the consequences of violations are unclear because the D.C. Circuit "did not consider the effect of FVRA violations" under Section 3348(d). Br. in Opp. 28. Section 3348 makes the consequences of violations plain, however, by specifying that subject to only a few exceptions, when an improperly-serving acting officer undertakes functions or duties tied exclusively to the PAS post in question, those actions "have no force and effect" and "may not be ratified." 5 U.S.C. 3348(d). And in any event, a decision that rejects the longstanding Executive Branch approach to acting designations would be significant enough to warrant review regardless of how attendant statutory penalties were construed.

withstanding" the designation mechanisms set forth in Subsections (a)(1), (a)(2), and (a)(3). 5 U.S.C. 3345(b)(1). And as explained in the petition (Pet. 5, 23-25), the interpretation of Subsection (b)(1) as overriding only the automatic accession of first assistants under Subsection (a)(1) is confirmed by the legislative history of the FVRA and by the construction given it by the General Accounting Office—an instrumentality of Congress—in 2001.

None of respondent's explanations justifies reading a provision made applicable "[n]otwithstanding subsection (a)(1)" as though it were made applicable "notwithstanding subsections (a)(1), (a)(2), and (a)(3)." Respondent first seeks support for its reading in the argument that "[t]he ordinary meaning of 'notwithstanding' is 'in spite of.'" Br. in Opp. 20. But that definition provides respondent no help, because construing Subsection (b)(1) as setting forth a rule that controls "in spite of" *Subsection (a)(1)* does not support construing Subsection (b)(1) as setting forth a rule that controls "in spite of" the entirely different directives concerning acting service in Subsections (a)(2) and (a)(3).[2]

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[2] Respondent invokes *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993) as supporting its interpretation of the "notwithstanding" clause here (Br. in Opp. 20), but *Cisneros* involved the distinct language that one would expect in a provision designed to have broad scope. The "notwithstanding" clause in *Cisneros* specified that a particular rule was to apply "[n]otwithstanding *any other provisions of this Contract*," rather than (as here) notwithstanding only a single provision. 508 U.S. at 14 (citation omitted) (emphasis added). It was this type of expansive "notwithstanding" clause that this Court said should be construed broadly. *Id.* at 18 ("[T]he use of *such* a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section

Nor is Congress's choice to single out only one of the three designation mechanisms plausibly explained on the ground that Subsection (a)(1), "by virtue of its mandatory language, most directly conflicts with Subsection (b)(1)." Br. in Opp. 21. As the petition explains (Pet. 15-16), in a discussion that respondent nowhere addresses, while Subsections (a)(2) and (a)(3) do not use the word "shall" because they apply only when the President chooses to invoke them, they are just as mandatory when invoked by the President as Subsection (a)(1) is when the President does not invoke them. They therefore just as "directly conflict[] with Subsection (b)(1)." Br. in Opp. 21.

2. In analyzing the text of the statute, respondent principally contends (Br. in Opp. 16-17) that Subsection (b)(1) should be read to override all of the FVRA's designation mechanisms because Subsection (b)(1) speaks of "person[s]" serving "under this section." 5 U.S.C. 3345(b)(1).

But that language does not defeat the natural conclusion to be drawn from Subsection (b)(1)'s limited "notwithstanding" language because it is consistent with either party's reading of Section 3345. While acting officials under Subsections (a)(2) and (a)(3) are "persons" serving under the FVRA, so too are acting officials under Subsection (a)(1). Congress could have used "person" and "this section" in Subsections (b)(1) and (b)(2) when discussing service by either the broader or narrower class. Indeed, as the petition notes (Pet. 17 n.3), the earlier version of the bill on

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override conflicting provisions of any other section.") (emphasis added); cf. Br. in Opp. 20 (quoting this language but replacing the word "such" with ellipses).

which the FVRA was based used the terms "person" and "this section," even though the only officials covered under that earlier version were indisputably first assistants serving under the subsection providing for automatic accession of the first assistant—*i.e.*, Subsection (a)(1) of the FVRA. The "person" and "this section" language accordingly does not counsel against the conclusion that Subsection (b)(1) is best read to defeat the operation of only the mechanism in Subsection (a)(1) that it singles out and expressly overrides.

Respondent next suggests that its reading is preferable because it accords with the "cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." Br. in Opp. 17 (citation and internal quotation marks omitted). Respondent's interpretation does not afford that benefit, however, because it gives no meaning to the phrase "[n]otwithstanding subsection (a)(1)." Respondent treats the phrase "notwithstanding subsection (a)(1)" as having no effect on which subsections *are* overridden by Subsection (b)(1) or on which are *not* overridden, because respondent considers every statutory designation mechanism to be overridden by Subsection (b)(1), whether expressly mentioned or not. Since respondent's view thus gives the "[n]otwithstanding subsection (a)(1)" proviso no legal effect, respondent's interpretation cannot be defended on the grounds that it avoids superfluity.

3. Respondent fares no better in seeking to explain the effects of its interpretation. As the petition explains, the manner in which every President has invoked the FVRA serves the statute's objectives while avoiding disparities in treatment of acting officials that do not serve the statute's objective of preventing

the use of acting designations to circumvent the advice-and-consent process. Pet. 18-19. Respondent seeks to justify the strange consequences of its interpretation by positing an alternative FVRA purpose of impeding the President ability's to "advanc[e] his agenda"—by preventing the President from having his "chosen replacement" serve as an acting official in advance of confirmation, even when that chosen replacement is within the "specified pool of competent caretakers" authorized to serve as acting officials under the FVRA. Br. in Opp. 19; see *id.* at 19-20.

But this hypothesized purpose is not a viable explanation of the disparities in treatment of acting officials that respondent's reading would produce. The FVRA indisputably authorizes the President to designate as both acting official and nominee an individual with 90 days of service in the position of first assistant prior to when the vacancy arose. See 5 U.S.C. 3345(b)(1)(A). Political appointees in first-assistant posts are more likely to have close connections to Presidents and their agendas than the senior career agency officials whose acting service is authorized under Subsection (a)(3). These provisions refute the suggestion that the FVRA reflects a "primary goal" of "prevent[ing] the President from directing his chosen replacement to perform PAS functions as an acting official without Senate approval." Br. in Opp. 25. On the contrary, as the petition explains (Pet. 18-22), respondent's view simply introduces strange disparities in the treatment of the acting officials that the statute allows to serve.[3]

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[3] Moreover, even under respondent's view, the FVRA would not prevent Presidents from picking acting officers who the President concludes will implement the administration's agenda from the

4. Finally, respondent offers no persuasive reason why the President's unbroken designation practice since the FVRA's enactment should not be given considerable weight in resolving the statute's meaning. See Pet. 22-23. Respondent does not dispute that every President since the FVRA's enactment has made appointments based on the understanding that Subsection (b)(1) limits only service by first assistants. Nor does it dispute that the Senate has routinely confirmed acting officials who were serving in a manner that would have violated the FVRA under respondent's reading. Indeed, like the government, respondent appears to have identified no occasion prior to the decision below on which Congress objected to such acting service. This settled practice sheds substantial light on the limitations that the FVRA was understood to impose when it was enacted. Respondent responds only that the Office of Legal Counsel opinion setting forth the Executive Branch's longstanding interpretation of the statute contained little detail, and that following the issuance of that opinion, the Office of Legal Counsel modified its view on a separate FVRA issue that was also addressed in that opinion. Br. in Opp. 23-24. But neither of those points undercuts the relevance of uniform practice to the

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FVRA-approved classes. Respondent's approach would simply force such officers to step down from acting service if the President finds no preferable outside candidate to fill the posts permanently and nominates them to serve permanently—in which case the President could pick new acting officials who the President concludes would also implement the administration's agenda. This presidential discretion belies the notion that the FVRA was intended to prevent the President from selecting acting officers who would implement the President's policy goals, when the President was choosing from among the class of approved acting officers.

meaning that the FVRA was understood to have when it was enacted. At a minimum, this Court should grant review to determine whether the approach adopted by every President since the statute's enactment should be set aside.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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